Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MANUELA NACE,
Petitioner,

-vs-

ACHIEVEMENT & GUIDANCE CTRS. OF AMERICA/ MEDCO BEHAVIORAL CARE SYSTEMS,
Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where the hostile work environment created by the employer culminated in tangible employment actions leading to economic injury, does the framework developed by this Court for assessing such claims under Title VII also apply to claims of hostile work environment under the ADEA?

2. Since there are specific distinctions between a hostile work environment based on sexual harassment and a hostile work environment based on national origin or age, can the standard established by this Court in determining the actionable level of sexual harassment be equally applied in determining the actionable level of national origin or age based harassment claims?

3. The Court in *Burlington Industries v. Ellerth* has asserted the role of tangible employment actions in determining employer liability. The Court has not yet asserted the role of tangible actions in determining whether the hostile work environment rose to the actionable level. The questions are:

> Should tangible actions, when they occur, be part of the analysis determining the actionable level? If so, where does the analysis of a hostile work environment claim involving tangible actions end, and where does the analysis of a disparate treatment claim begin? What is plaintiff's burden of proof for tangible actions under a hostile environment claim versus the burden of proof for discrimination under a disparate treatment claim?

4. Where a plaintiff's prima facie case of discrimination and/or retaliation is based on uncontested facts and the facts are supported by a preponderance of the evidence, did the plaintiff establish her prima facie case as a matter of law?

5. Since the analysis of a prima facie case of discrimination differs as a matter of law from the analysis of a prima facie case of retaliation, can a court at summary judgment apply its finding with respect to plaintiff's prima facie case of discrimination to the

prima facie case of retaliation, without reviewing plaintiff's protected activities or the causal connection?

6. Where the factually disputed issue with respect to plaintiff's termination is based solely on credibility determinations, can a court at summary judgment act on behalf of the defendant and produce a new business rationale to justify the adverse employment decision without giving the parties an opportunity to brief or argue on the newly raised issue, and then based on such new business reason articulated by the court, grant summary judgment to defendant?

PARTIES TO THE PROCEEDING

Petitioner Manuela Nace was the plaintiff before the United States Court for the Southern District of New York, and the plaintiff-appellant-cross-appellee before the Court of Appeals for the Second Circuit. Petitioner is referred to by "plaintiff, "petitioner" or "Nace" in this petition.

Respondent Achievement & Guidance Centers of America, Inc., a.k.a. Medco Behavioral Care Systems, a.k.a. Merit Behavioral Care, a.k.a. Magellan Behavioral Healthcare, was the defendant before the District Court and the defendant-appellee-cross-appellant before the Court of Appeals. Respondent is referred to by "defendant" or "MBC" in this petition.

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The Summary Order of the Court below affirming in part, vacating and remanding in part the decision of the district court is set out at pp. 1a-4a of the Appendix ("App. __") to the Petition for Writ of Certiorari. The Order and Judgment of the district court granting summary judgment to defendant on petitioner's Title VII and ADEA claims and adjudicating petitioner's FLSA claim in her favor, is set out at App. 5a-9a.

STATEMENT OF JURISDICTION

The Summary Order of the court below was entered on May 16, 2000, and is not reported. A timely petition for rehearing en banc was denied on August 8, 2000. App. 10a-11a. The jurisdiction of the Court is invoked under 28 U.S.C.§1254(1).

STATUTES AND RULES INVOLVED

The relevant statutory provisions are set out at App.12a-14a

STATEMENT OF THE CASE

Petitioner Manuela Nace ("petitioner", "Nace" or "plaintiff") brought suit against defendant Achievement & Guidance Ctrs. of America/Medco Behavioral Care Systems, Inc. ("defendant" or "MBC") in 1994, alleging claims of hostile work environment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 *et seq.*, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 *et seq.*, ¶296 (3-a)(a) of the NYHRL, and the Municipal Code of the City of New York, §8-107(1)(a), claims of discrimination and retaliation under Title VII and the ADEA, and a claim of unlawful overtime payment under the Fair Labor Standards Act ("FLSA"), 29 U.S.C.§201 *et seq.*

Upon completion of discovery, MBC moved for summary judgment seeking dismissal of plaintiff's claims of discrimination and retaliation, and admitting liability under the FLSA claim. The district court adjudicated the FLSA claim in plaintiff's favor, dismissed with prejudice plaintiff's claims under Title VII and the ADEA, and dismissed without prejudice plaintiff's New York State and New York City claims. App. 5a-9a.

The Court of Appeals exercised jurisdiction over Nace's claims pursuant to 28 U.S.C. §1291, affirmed the dismissal of Nace's employment discrimination claims, vacated the judgment on the FLSA claim and remanded the case to the district court for a fuller explanation of its FLSA award calculation. App. 1a-4a.

Nace timely filed a petition for rehearing en banc, showing that the decision reached by the court of appeals conflicted with many of its prior decisions in similar cases. The petition was denied on August 8, 2000. App. 10a-11a.

A. Course of Proceedings Regarding Petitioner's Claims of Hostile Work Environment.

1. The Evidence of Age and National Origin Based Harassment Before the Lower Courts

Petitioner and her husband ("Doru") were born and raised in Romania, and came to the United States as political refugees from Romania in 1989, with the status of permanent residents.

The defendant is a leader in the managed mental health care industry. Plaintiff began employment with MBC in December 1992 and was terminated in October 1998. Nace's employment with MBC can be divided into two major parts: (1) the first part where plaintiff's supervisor, Belowich, the MBC NYC Director of Operations, engaged in a course of unlawful conduct leading to Nace's EEOC charge in June 1994 and to her complaint in court in December 1994; and (2) after 1994, where certain executives deeply resented Nace's lawsuit against the company, and translated their feelings into discriminatory and retaliatory practices, by using the same mechanism for discrimination as Belowich had used (the same denial of equal rights to training, the same unfair and discriminatory devices used in order to deny her equal rights to salary raises, the same retaliatory practices following plaintiff's complaints about discrimination, etc.) .

The record shows that soon after the commencement of her employment, plaintiff experienced increasingly discriminatory, hostile, offensive, and threatening conduct on the part of Lieberman (Area Director – the head of the NYC office, to whom Belowich reported), but mostly on the part of Belowich, because plaintiff was of Romanian origin and much older in years than the majority of the NYC office female employees.

Lieberman and Belowich would call her "*Many*", explaining that "*Manuela*" *did not sound American.* When they did not call her "Many", they called her "*Hungarian*", and when Petitioner asked Belowich why he called her Hungarian, he said "*Hungarian*" *or* "*Romanian*", *didn't matter, they were both underdeveloped countries.* Both Lieberman and Belowich admitted calling her "Hungarian". No employees of other national origins had been called by their ethnicity or offended with regard to their country of origin.

Belowich would ask Nace, "*Why didn't you come to this country when you were young?*", in the context of MBC's undisputed tendency to hire mainly female employees in their 20's, as the statistics submitted by Nace revealed.

Between February 1993 and March 1994, i.e., for 13 months, Belowich would call Nace "*old and wretched*" two to four times a week. When she objected explaining that she could not work under the pressure of his harassment, Belowich would say: "*No wonder an old and wretched person like you cannot work under pressure*", or, "*I don't like to have such old and wretched women in my office*". When Nace complained to Lieberman about the "*old and wretched*" remarks, he requested that she talk to Belowich.

When confronted with the "*old and wretched*" remark during the 1994 internal investigation by Johnson (delegated by the Corporate Headquarters to investigate Nace's allegations of harassment and unfair treatment), Belowich "acknowledge[d] that they could have joked in that context ... ". Belowich had a practice of calling the other 2 older women in the office "old and wretched". MBC employees testified hearing Belowich call Nace and the other two older women in the office "*old and wretched*".

In the spring of 1993, Belowich showed Nace the lines at the Unemployment Office that was located right across their office. He pointed to most of the people in line being older people, like plaintiff, and added: "*One day you will be staying in that line*". He admitted he had "used that type of statement". Nace alleged that the remark was both threatening and discriminatory, since he never made any such remark in front of the young employees.

In February 1993, when Nace asked Belowich why MBC was paying overtime after 42 instead of 40 hours worked in a week, he admonished her that in America people worked and didn't question policies, and also said: "*If you don't like it here, go back to your fucking country and complain about this to your people there*".

In May of 1993, Belowich told Nace that she had come from a *bad European work mentality*, and that she was the product of the *bad schools in Romania*.

In June of 1993, as plaintiff complained to Lieberman about Belowich's discriminatory request made solely to her and her husband (Doru Nace holds a Ph. D. degree in dynamical systems, and was also working under Belowich's supervision) to clean other employees' computers, Lieberman said "*Do we Romanians have royal blood and can't clean other people's computers*?"

Later that day, Belowich yelled at Nace and her husband: "*You went to complain to Dan Lieberman about my asking you to clean computers ... keep this in mind, as long as you work in this office, you are my Romanian slaves working for me*". Nace complained to both Lieberman and Johnson about this further humiliating and discriminatory conduct. Johnson's report acknowledged that "*Other references to her ethnic background were made*". The record proved that Belowich had a practice of calling his subordinates of Romanian, African-American, and Hispanic origin "SLAVES".

Johnson's report also indicated that Belowich had asked plaintiff: "*If I lay off Doru, do you promise you will also leave*?"

In or about July 1993, Belowich told Nace and her husband: "*I know everything you do and speak in your house*", because "*the FBI is watching over all the people coming from those fucking Eastern countries, because they have to know what those people do*". He kept saying that the FBI was watching them because they had come from Romania, "*that fucking country*".

In or about September, 1993, Belowich suggested to Nace that she try to convince her husband, "*that there [was] no future in this company for Doru because of his [Romanian] accent*".

On November 10, 1993, no longer able to endure such harassment, Nace wrote a memo to Belowich, stating: "I feel I cannot get unproductive or inefficient because of your obviously intentional attempts to negatively impact upon my work", and "For the past 4 days I was constantly being harassed by you".

After he received the memo, Belowich called Nace to his office and yelled at her, saying her memo was "crap", that HE was dictating in this company, and threatened her: "*You're just tolerated in this country and you are tolerated in this company*".

The next day, November 11, plaintiff was placed on a 60-day probation. The record contains powerful evidence proving that

the reasons given in Belowich's memo justifying the probation were maliciously concocted and flagrantly false. The evidence proved Belowich had deliberately fabricated "missed deadlines" to justify the probation. Such evidence had also been attached to a written complaint Nace forwarded to Corporate Headquarters, in which she requested that the probation be revoked because it was based on false allegations, as the documents proved. Neither Nace's allegations of fabricated reasons nor the evidence brought in support thereof were ever contested by the company, yet the probation was not revoked.

On November 24, 1993, the day before Thanksgiving, Nace was requested to work on an assignment over the holiday. When she told Belowich that she could not enjoy Thanksgiving because of such unfair assignment, he said: "*This is not your holiday, this is our American holiday ...* ". Nace alleged that the discriminatory assignment had been given to her because of her Romanian origin, because Thanksgiving was an American holiday to which, according to Belowich, she was not entitled. Nobody else had been requested to work over Thanksgiving.

Concomitantly, Belowich harassed Doru on account of his age and national origin, repeatedly telling him that despite his superior qualifications and performance, because of his age and accent there was no future for him in that company. Belowich not only verbalized his discriminatory feelings, he also acted on them: in the performance appraisal he did to Doru, he referenced Doru's foreign accent: "*In speaking English as a second language, Doru has a severe articulation disorder*", and underrated Doru's communication skills accordingly ("Needs Improvement").

Right after defendant found out about plaintiff's EEOC charge of discrimination, Belowich threatened her by saying: "*Do you think we can't get you? We'll get you, just wait and see*".

Significantly, the above listed hostile, insulting, and threatening remarks occurred during Nace's employment, were made by her supervisor, and were directly addressed to Nace.

II. Evidence Before the Lower Courts Showing the Hostile Environment Had Caused Emotional Suffering and Had Altered the Terms and Conditions of Plaintiff's Employment

(a) *Psychological Harm*: The record before the two courts below contained conspicuous evidence proving that the hostile

environment caused Nace to suffer emotional injury. Belowich's constant harassment and the cascade of tangible actions against plaintiff put tremendous pressure on her and deteriorated her health. The two medical reports showed that Nace had developed Adjustment Disorder as a result of defendant's discriminatory conduct. She went into psychotherapy for a long period of time.

(b) *Tangible Actions against Plaintiff*: Despite Nace's exceptional performance[1], the defendant took the following tangible actions against her in 1993-1994 (the first part of Nace's employment with MBC): (1) The day following her November 10, 1993 memo complaining about Belowich's harassment, she was placed on a 60-day probation; (2) On January 25, 1994, she was placed on an extension of probation for another 60 days, because "*Inasmuch as you will be working primarily under the direction of Christine Jaggi, Area Director, AGCA has decided to extend your probation so as to give Christine ample opportunity to assess your performance as her Administrative Assistant*"; (3) Failure to promote: once in December 1993, and a second time in January 1994; (4) She was denied a bonus that all similarly situated employees received in 1993; (5) She was denied a merit increase that all similarly situated employees received in 1993; (6) On April 4, 1994, 2 weeks after her complaints about age and ethnic harassment during the investigation by Johnson, she was demoted; (7) On June 17, 1994, two weeks after the filing of her EEOC charge, she was given a written warning based on further false allegations; (8) She received a retaliatory performance review for 1994, by Jaggi, and a discriminatory merit increase. Plaintiff submitted compelling evidence of disparate treatment, including statistical evidence, showing she had received the

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[1] The affidavits of MBC managers and executives describe Petitioner's performance in terms like: "outstanding performance", "good judgment, great organizational skills and willingness to make us succeed, regardless of tough deadlines, high demands and large workload", her "easy going, warm and gracious" nature, "the same professional competence, the same willingness to help, the same kind and warm demeanor ... the same patience, and all this regardless of how busy she was", "invariably demonstrating to have exceptional writing, word processing, communication, and interpersonal skills", " the outcome was always perfect", "extremely reliable in all respects", "always prompt and effective even though her workload was immense", "very successful in handling numerous tasks simultaneously", "always willing to go above and beyond what is requested of her", etc.

lowest merit increase of all similarly situated employees.

III. Proceedings Below

The district court acknowledged the pervasiveness of the hostile remarks, "once or twice a week can be quite a lot", yet found the remarks did not rise to the actionable level. On appeal, Nace argued that the district court did not apply the correct standard for actionable harassment and summary judgment, and thus erred in dismissing her hostile work environment claims.

At oral argument the court below pointed to the existence of factual issues with respect to Nace's hostile environment claim, by virtue of the tangible action ("she got on probation") taken against plaintiff "shortly after [Belowich's age and national origin remarks]", yet issued a summary order holding that the defendant's comments and actions "[did] not amount to the creation of a hostile work environment". App. 3a.

B. Course of Proceedings Regarding Petitioner's Claims of Discrimination under Title VII and the ADEA

In addition to the "tangible" actions listed at page 6 of the instant petition ("Pet. at __"), plaintiff had alleged a number of discriminatory actions which had not entailed direct economic injury, yet had discriminatorily altered her terms and conditions of employment: (1) discriminatory assignments; (2) discriminatory workload; (3) denial of equal rights to training; (4) denial of equal rights to supervision; (5) discriminatory monitoring of work; (6) discriminatory record of performance failures. Each allegation of discrimination had been supported by a preponderance of the evidence, including evidence of disparate treatment, evidence proving defendant's proffered reasons were false, evidence of state of mind, forbidden animus, and discriminatory intent, statistical evidence. The record also showed that the hostile remarks had been contemporaneous with the 1993-1994 discriminatory actions alleged.

The district court reviewed two of plaintiff's allegations of discrimination pertaining to the first part of her employment (the hostile work environment claim and Nace's demotion of 1994), and plaintiff's termination of 1998, the last in a series of allegations of unlawful practices from the second part of her employment, and concluded that plaintiff had not made out a prima facie case of discrimination. Thereupon, the court dismissed all the Title

VII and ADEA claims, including claims the court had not reached.

On appeal plaintiff proved that she had established a prima facie case of discrimination and/or retaliation, and showed that most of her claims had been completely ignored.[2]

The Summary Order issued by the court below does not challenge plaintiff's argument, does not contest the sufficiency of plaintiff's evidence, and does not respond to any of the material questions raised by plaintiff in her brief. All it says with regard to these claims is: "we agree with the district court that Nace has failed to make out a claim of discrimination or retaliation".

C. Course of Proceedings Regarding Petitioner's Claims of Retaliation

Although plaintiff had alleged a number of retaliatory actions before, and in particular, after she filed her EEOC charge and complaint in court, the district court completely ignored plaintiff's claims of retaliation, both during oral argument (where, except for responding to the court's questions, plaintiff was not afforded a reasonable opportunity to argue) and in its ruling, which does not mention anything about the many allegations of retaliation. App. 24a-28a. (Pet.at 29)

At the oral argument before the Court of Appeals, plaintiff discussed the retaliatory performance review by Snell, Nace's supervisor for 1996. When asked by the court to respond to plaintiff's allegations, defendant's counsel produced a legitimate reason to rebut the presumption of retaliation created by Nace's prima facie case. Defendant did not contest any of the facts or evidence supporting plaintiff's prima facie case of retaliatory performance review. Yet, the court below affirmed the judgment of the district court (holding that plaintiff had failed to make out a prima facie case of discrimination) "for substantially the reasons [the district court] gave" and held that "Nace has failed to make out a claim of retaliation". App. 2a.

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[2] Each discriminatory action alleged had been briefed under separate heading, with citations to the over 1400 pages of evidence from the Joint Appendix. The evidence had been compartmentalized under each prong of her *prima facie case*, and apart from the evidence proving pretext.

REASONS FOR GRANTING THE PETITION

A. PETITIONER'S CLAIMS OF HOSTILE WORK ENVIRONMENT BROUGHT UNDER TITLE VII AND THE ADEA RAISE SEVERAL CRITICAL ISSUES WHICH WARRANT REVIEW BY THIS COURT

I. No framework to assess a claim of hostile work environment under the ADEA, and no specific standard to establish the actionable level of a national origin harassment claim

In examining a claim of discrimination or retaliation brought under the ADEA, this Court and other courts have followed the same standard as in a Title VII action. However, neither this Court nor the Second Circuit have yet addressed a claim of hostile work environment under the ADEA. While on the issue of employer liability courts may readily borrow from the standard established by this Court in *Burlington Industries, Inc. v. Ellerth*, 524 U. S. 742, 754 and *Faragher v. Boca Raton*, 524 U. S. 775, the standard established by this Court in *Harris v. Forklift*, 510 U.S. 17 (1993) for determining the actionable level of a hostile work environment claim is not readily applicable to an age hostile work environment claim. The particular nature of an age based hostile work environment claim (similar to that of a national origin based hostile work environment claim, as set forth below) calls for a more specific test and more precise guidelines in determining the actionable level.

Title VII declares discriminatory practices based on race, gender, religion or national origin equally unlawful. The courts and the general public are alerted to racial and sexual harassment due to the frequency and publicity of such occurrences, and therefore courts tend to give preferential treatment to such claims. Title VII, however, does not differentiate on the basis of frequency, public alertness, or social landscape. By enacting Title VII, Congress did by no means intend to favor certain protected classes over other protected classes. Indeed, the dissenting opinion in *Burlington* had noted that sexual harassment is a form of employment discrimination, just like any other, and "[a]s such, it should be treated no differently (and certainly no better) than

the other forms of harassment that are illegal under Title VII".

This Court has reviewed hostile environment claims based on sexual harassment.[3] The Court has issued a set of guidelines which, it held, should be applied to any claim brought under Title VII. Nonetheless, the few definitive rules for determining the actionable level and the absence of instructions tailored to the specificity of a national origin harassment claim have produced inconsistent decisions. For example, the decision reached by the court below here conflicts with this Court's established standard for determining the actionable level in sexual harassment cases like *Meritor, Harris, Burlington,* and *Faragher,* and also conflicts with the way the court below applied such standard to prior racial or sexual harassment claims. Plaintiff's petition for rehearing en banc outlines a series of inconsistencies between the standard applied by the Second Circuit to her case and the more lenient standard applied to previously reviewed cases of racial harassment, e.g., *Jemmot v. Coughlin, et. al.; Richardson v. N. Y.S. Dept.,* 1997 WL 797527; *Schwapp v. Town of Avon,* 118 F.3d 106.

There are important distinctions between sexual harassment cases and age or national origin harassment cases, beginning with the degree of hostility, continuing with the harasser's state of mind or intent, and ending in what this Court in *Meritor* has asserted as being the ultimate focus of the test, the change in the victim's conditions of employment. For example, a victim of sexual harassment might enjoy equal employment opportunities (e.g., be promoted, or receive higher merit increases), while a victim of age or national origin harassment is unlikely to enjoy equal and fair employment opportunities, because in such cases the harassment, more often than not, originated in the offender's forbidden animus and intent. Thus, plaintiff in *Meritor* was promoted (three times), and so was plaintiff in *Burlington.* The Court in *Meritor* did emphasize that Vinson's promotions were based on merit, but it is exactly such acknowledgement of merit and equal rights to promotion that petitioner claims is a critical distinction between sexual harassment on one hand and age or national origin harassment cases on the other hand, and petitioner's case is a relevant example in this respect.

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[3] *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986); *Harris v. Forklift,* 510 U.S. 17 (1993); *Burlington Industries v. Ellerth,* 118 S. Ct. 2257 (1998); *Faragher v. City of Boca-Raton,* 118 S. Ct. 2275 (1998); *Oncale v. Sundowner Offshore Services* (1998).

Also, what may be critical to assessing a claim of sexual harassment may be wholly irrelevant or altogether absent from a claim of age or national origin harassment. The issue addressed in *Meritor*, for example, whether the sexual advances were "unwelcome", is strictly limited to sexual harassment cases and will very rarely, if at all, be applicable to a claim of national origin or age harassment, where common sense dictates that such harassment may never be welcome. Similarly, there will be rare cases where sexual harassment would culminate in tangible actions (Petitioner is not referring to *quid pro quo* cases, a category apart) because sexual harassment is ordinarily not originating in the offender's adverse animus. And indeed, in none of the cases of sexual harassment reviewed by the Court did the offender take any tangible action against the victimized employee, wherefore the Court did not need to address the role of tangible actions in determining the actionable level. (see also Pet. at 14-15)

The Court in *Faragher* noted that "racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable", and therefore, "there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment". Given the particular nature of sexual harassment versus age or national origin harassment, or given the specificity of racial harassment in today's American social landscape, harmony in standards was not achieved, and courts will continue to issue inconsistent holdings.

Indeed, this Court in *Harris* had noted that "especially egregious examples of harassment ... do not mark the boundary of what is actionable", yet it is not clear what exactly marks the boundary of what is actionable. The disjunctive use of 'severe' or 'pervasive', or the Court's emphasis on 'no single factor is required', and its instructions to consider 'all the circumstances' provide little guidance as to how many criteria, and how much of each criterion would be necessary for a claim to reach the level of "actionable". Therefore, there is a need for more tangible boundaries and for a more precise test (not mathematically precise) to ensure consistency in determining the actionable level.

II. The decision of the lower courts holding that the alleged conduct failed to amount to an actionable level conflicts with the actionable standard established by this Court in *Meritor*, *Harris*, *Burlington*, and *Faragher*.

The decision of the lower courts conflicts with this Court's instructions regarding the standard for actionable harassment as it had been asserted in *Meritor*, reasserted in *Harris*, and further affirmed in *Burlington* and *Faragher*. Going by this Court's standard, the discriminatory conduct of petitioner's supervisor did amount to the creation of a hostile work environment. Thus:

(a) "*Discriminatory*" behavior and environment: The record indicated that Belowich's harassment was discriminatory by virtue of (i) its substance -- invariably stigmatizing Nace because of her age and/or national origin; (ii) the targeted victims -- only employees of Romanian, African-American, or Hispanic origin were called "slaves"; only Nace was obliged to work over Thanksgiving; only older employees were humiliated and threatened because of their age, etc. *Meritor* ("when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex") (see Pet. at 3-5)

(b) Workplace "*permeated*" with discriminatory behavior: The "regular" and "frequent" incidents, Belowich's pattern of harassing employees of Romanian origin, his pattern and practice of disparate treatment of Romanians and older employees, when viewed in their totality, reveal a virtually unbroken stream of hostility and a workplace permeated with discriminatory conduct.

(c) *Sufficiently severe*: Due to its hostile and humiliating nature, its threatening and malicious purpose, the harassment in question was severe as a matter of law. Such conduct is plainly distinguishable from the counterexamples cited by the Court in *Harris* and *Faragher* ("simple teasing", "offhand comments", "isolated incidents", "rudeness").

Here, the harassment was both *objectively* and *subjectively* severe. The Court held that "Objective severity of harassment should be judged from the perspective of a reasonable person in plaintiff's position, considering 'all the circumstances'". *Oncale v. Sundowner Offshore Services* (1998). By applying its own perception ("it seems to me" - App. 26) of "*boorish*" and "*verbal indiscretions*" (*see* Pet. at 24), the district court did not use the proper approach, as defined in *Oncale*, and discounted the objectively hostile and discriminatory nature of those "boorish" remarks[4], the very meaning this Court had attached to its use of

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[4] Plaintiff had written in her brief on appeal: "The remarks under discussion were exclusively national origin and age based, and thus strictly related to the

"boorish and offensive" in *Burlington*.

The record was also replete with evidence demonstrating that petitioner had *subjectively* perceived the environment as extremely hostile. (See Pet. at 5-6) Actually, Johnson had noted in her report, "Manuela described harassment as 'humiliation'". The medical reports indicated that Nace suffered emotional injury. According to the Court's instructions in *Harris* that "*the effect on the employee's psychological wellbeing is relevant in determining subjective perception*", plaintiff's psychological injury should have weighed heavily against a grant of summary judgment.

Importantly, although the Court in *Harris* did not need to address the issue of how much weight is to be accorded to evidence of tangible emotional harm, it noted: "This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury". Thus, the Court had placed cases where the conduct caused psychological harm at the extreme end of subjective perception. Here, in sharp contrast with the Court's view, the lower courts have disregarded such extreme consequence of hostile conduct. Therefore, it is critical that the Court rule on the weight to be conferred to the evidence of tangible emotional harm.

(d) *Sufficiently pervasive*: Here, the district court found the harassment was pervasive, since it noted: "once or twice a week can be quite a lot". In all the cases of sexual harassment reviewed, the Court has consistently held that the harassment was actionable if it was "severe" or "pervasive". And indeed, the Court held that Faragher's claim was actionable although the harassment was found to be "intermittent".

(e) Determination is made by looking at *all the circumstances*: pervasiveness, severity, the effect on the psychological wellbeing, unreasonable interference with work, change in the victim's terms

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impermissible animus. The fact that they were also "boorish" does not exculpate defendant from liability, on the contrary, it completes the picture and emphatically points to the offensive nature of such remarks ... The "boorish" element of the remarks in this case derives directly from the substance of the message they conveyed which was invariably stigmatizing Plaintiff because of her Romanian national origin and her age. Actually, if Belowich's conduct had been merely "boorish", he would have used similar remarks with employees outside Plaintiff's protected class. He did not." (Brief at 10-11)

and conditions of employment.[5]

The district court's acknowledgement of pervasiveness, the indisputable evidence of Nace's subjective perception of the harassment as very humiliating, threatening, and degrading, the psychological harm inflicted, the discriminatory character of the harassment, along with evidence of interference with her work and change in the conditions of her employment should have precluded the courts from granting summary judgment to defendant on the claim of hostile work environment, because determination is made by looking at "all the circumstances".

IV. The Court has not yet established the role of tangible actions in determining the actionable level of a hostile work environment claim

This Court in *Burlington* held:

> "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor ... When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence" (emphasis added).

The Court further explained: "*No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action*". Accordingly, the tangible actions get into the picture only following a finding of actionable harassment. At oral argument, the Second Circuit did address the issue of tangible action ("she got on probation") taken against Nace "shortly after this kind of remarks", and asked defendant's counsel to explain "how the Court could decide that there was no fact issue involved with this hostile work environment ... by virtue of the fact that when she did her report she didn't mention

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[5] The record showed that petitioner wrote to Belowich that she found his intentional attempts to negatively impact upon her work very aggravating, that she complained about being unable to work under the pressure of his harassment, about her health having deteriorated because of the harassment and unfair treatment. In *Harris*, the Court explained: "To show such interference ...'[i]t suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ma[k]e it more difficult to do the job" (citations omitted).

these things". App. 19a-20a. In response to the court's question, defendant's counsel resorted to the affirmative defense (the reasonableness of the complaints), which does not precede, but follows a finding of "actionable hostile environment". According to *Burlington*, the defendant's affirmative defense was in all respects immaterial to the dispute: if plaintiff's claim did not rise to the actionable level, the discussion of the next step, her complaints, was inapposite; if plaintiff's claim did rise to the actionable level, given the tangible actions against her, the affirmative defense was not available.

In sum, the discussions from oral argument did not suggest that plaintiff's claim of hostile work environment was not actionable as a matter of law. In fact, the court below appeared to suggest that there were factual issues "for a jury to figure out".

Due to the absence of tangible actions in *Meritor*, *Burlington*, or *Faragher*, the Court has only tangentially addressed this issue, and only in the context of determining employer liability.

However, once the ultimate test for determining whether or not the hostile environment rose to the actionable level is the change in the victim's conditions of employment (see *Meritor*), tangible actions, if they occur, should be an important factor to be considered in the analysis of the actionable level. Such actions are originating in the same animus expressed through verbal harassment. By failing to include the tangible actions into the equation seeking to determine the actionable level of the harassment, a court may not be said to have reviewed "all the circumstances" or to have completed the analysis of how much the plaintiff's conditions of employment had been altered.

The Court has not yet addressed the role of tangible actions in determining the actionable nature of such a claim , and it is, therefore, important that the Court establish a framework for the analysis of a hostile work environment claim involving tangible actions: Does the analysis of tangible actions follow the path of disparate treatment actions? If so, where does the analysis of a hostile work environment involving tangible actions end and where does the analysis of a disparate treatment claim begin? Where the tangible actions constitute separate disparate treatment claims, do they drop from the picture when determining the actionable level of a hostile environment claim? What is plaintiff's burden of proof for tangible actions under a

hostile environment claim versus the burden of proof for discrimination under a disparate treatment claim?

For all of the foregoing reasons, this case is a highly suitable vehicle for the Court to establish the framework for assessment of a hostile environment claim under the ADEA, and further explain, implement and refine its guidelines for the analysis of national origin based hostile work environment claims, with clear instructions for the analysis of tangible actions for purposes of determining the actionable level of such a claim.

Finally, the Court should not permit decisions which conflict with its previous holdings, like the court below's, without review.

B. THE DECISION REACHED BY THE LOWER COURTS CONTRAVENES THE SETTLED LAW FOR THE ANALYSIS OF A PRIMA FACIE CASE OF DISCRIMINATION OR RETALIATION

I. The burden imposed by the lower courts upon plaintiff at the prima facie stage conflicts with the *minimal* or *not onerous* burden established by this Court

The Court had characterized the burden of establishing a prima facie case of disparate treatment as "not onerous" in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, (1981), and as "minimal" in *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

All that a prima facie case is required to do is to create a presumption that the employer unlawfully discriminated against the employee. *Furnco Construction Corp. v. Waters*, 438 U.S. 567. Petitioner's prima facie case had gone above and beyond such minimal burden. She had supported her allegations by a preponderance of the evidence, including evidence of disparate treatment, of Belowich's forbidden animus and state of mind, of his stigmatizing stereotypical thinking with regard to age and Romanian national origin, of his pattern and practice of discrimination against Romanians and other class protected members, evidence of discriminatory intent, as well as statistical evidence showing defendant's tendency in hiring and promoting very young employees of American origin.

Based on the Second Circuit's decision in *Ostrowski v. Atlantic Mut. Inc. Cos.*, 968 F.2d 171, 182 (1992) holding that "statements of a person involved in the decision making process that reflect animus of the type complained of in the suit", would entitle a

plaintiff to a Price Waterhouse burden shifting instruction, petitioner had also asserted a "mixed-motive" prima facie case. Regardless of the test being applied to her prima facie case, petitioner claims she has established a strong prima facie case of discrimination and retaliation.

II. The decision of the lower courts conflicts with the Court's opinion in *Saint Mary's Honor Ctr. v. Hicks* holding that a prima facie case is established as a matter of law when plaintiff's facts are uncontested

The record before the courts below firmly established that many of the facts and evidence brought in support of plaintiff's prima facie case remained uncontested by the defendant, which according to this Court's opinion in *St. Mary's*[6] indicates plaintiff had established her prima facie case as a matter of law. The following evidence supporting plaintiff's prima facie case was not contested: evidence showing (1) that plaintiff is a member of the classes protected under Title VII and the ADEA; (2) that she was qualified for the position; (3) that the discriminatory actions alleged are cognizable adverse actions under the statutes; (4) that Nace had requested to be sent to training on Harvard Graphics, which she needed in order to complete her assignments; (5) that her request was denied; (6) that Nace was placed on probation the day following her complaint about Belowich's "constant harassment"; (7) that plaintiff suffered psychological harm; (8) that Jaggi's comments and ratings under the performance appraisal done to Nace were unfair and contradicted by the evidence in the record; (9) that Jaggi prepared Nace's performance appraisal for 1994, yet Belowich completed the ratings (in his own hand) though he had had no supervisory role for that review period; (10) that similarly situated employees received higher ratings and merit increases than plaintiff did under the same performance review process; (11) that the unlawful remarks were contemporaneous with the adverse actions taken in 1993-1994; (12) that plaintiff complained during Johnson's investigation about age and national origin harassment; (13) that less than 2 weeks after her complaints during Johnson's

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[6] A prima facie case is established "either as a matter of law (because the plaintiff's facts are uncontested) or by the factfinder's determination that the plaintiff's facts are supported by a preponderance of the evidence". *St. Mary's.*

investigation, the defendant transferred her from reporting to the Area Director to reporting to the office manager, two levels lower; (14) that Belowich also harassed other class protected employees; (15) that Freeman, the defendant's Human Resources Assistant, knew Belowich humiliated and insulted ethnically and racially protected class members by calling them "slaves"; (16) that Freeman knew Belowich called plaintiff "old and wretched" "on a regular basis"; (17) that Belowich gave untruthful responses during his deposition (this had been acknowledged in writing); (18) that plaintiff was the only employee required to work for about 20 hours over the 1993 Thanksgiving; (19) that Nace was terminated based on Freeman's allegation that Nace had intimidated and threatened her; (20) that Nace had fervently and consistently denied Freeman's allegation; (21) that the sole reason given by defendant for Nace's discharge was Freeman's allegation that Nace had intimidated or threatened her; (22) that Nace had complained verbally and in writing about the discriminatory treatment in 1996-1997; (23) that, due to the assignments received in 1996 she had requested training on Excel; (24) that she was denied training on Excel; (25) that similarly situated employees received such training; (26) that she was denied equal rights to the provision of overtime; etc.

The fact that defendant did not contest any of the above, is not the result of mere oversight, it is because each and every such fact is supported by indisputable evidence.

What follows is a specific example of facts and evidence brought in support of plaintiff's prima facie case which had not been contested by defendant: the retaliatory performance review by Snell, Nace's supervisor for 1996, rating her with "Needs Improvement", based on which Nace was denied a merit increase. The record before the courts contained the following uncontested evidence of Nace's prima facie case of retaliation:

(1) Nace's *protected activities*: a) Snell's testimony confirming that Nace had complained to her about discriminatory treatment on several occasions; b) The documentary evidence showing plaintiff had also complained to MBC's Vice President and to MBC's Director of HR about the same discriminatory treatment;

(2) The low performance rating and the denial of equal rights to a salary raise are *cognizable adverse actions* under the statutes;

(3) Nace had proved *causal connection* between her protected activities and the adverse action, the last prong of a prima facie

case of retaliation, through: (a) closeness in time (the review was done 2-3 weeks after Nace's last objection to discrimination); (b) disparate treatment (unlike Nace, all the other administrative assistants received higher performance ratings, and thus received a merit increase); and[7] (c) evidence of retaliatory motive.[8]

Not only did defendant not contest the above facts underlying Nace's prima facie case, it remained completely silent with regard to plaintiff's allegation of retaliation in performance reviews, and thus failed to meet its burden of production to rebut plaintiff's prima facie case.[9]

If only one such prima facie of retaliation, and one prima facie case of discrimination (where the facts and evidence remained uncontested) had been reviewed by the lower courts according to the model for summary judgment asserted by the Court in *Anderson v. Liberty Lobby*, 477 U.S. 242, (Pet. at 19, 21-22), plaintiff's claims may not have been dismissed for failure to make out a prima facie case, because it is indisputable that plaintiff had established a prima facie case as a matter of law. *Saint Mary's.*

III. The lower courts' failure to review all of the evidence in the record, and their disregard for the evidence in favor of the non-moving party conflicts with this Court's holding in *Anderson v. Liberty Lobby*, and resulted in further errors

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[7] It is well established that any of the 3 ways is individually sufficient, as a matter of law, to prove causal connection for purposes of establishing the last prong of a prima facie case of retaliation.

[8] Snell had testified that the written comment supporting the low rating of "Needs Improvement", i.e., "*An effort needs to be made to have a more global positive attitude toward the company in general*", referenced Nace's repeated complaints about discriminatory treatment, and her lawsuit against the company, which were regarded as "negative" and as being "a problem", and thus Snell's testimony served as an additional proof of causal connection.

[9] It was only at oral argument before the court below, and only upon the court's express request that defendant's counsel address the allegation of retaliatory performance review, that Mr. Goldstein produced a legitimate reason to rebut Nace's prima facie case. Given the 1 minute only left for rebuttal, Nace did not have the opportunity to direct the court's attention to further evidence in the record, i.e., to Snell's testimony stating that nobody at all had complained about plaintiff's attitude. Moreover, unable to explain the obviously unfair and retaliatory rating under plaintiff's performance evaluation, and in an attempt to hide discrimination, Snell testified that "*I don't know who gave the ratings*", an improper response, probative of bad faith, given that she had authored Nace's appraisal.

Liberty Lobby held that a court at summary judgment must review the record as a whole. The settled law is that courts may not disregard the evidence favorable to the non-moving party in determining whether there is a trial-worthy issue, because a jury would be entitled to review all the evidence in the record.

The district court briefly reviewed three claims of discrimination (plaintiff's hostile work environment claim, plaintiff's demotion of 1994, and plaintiff's termination), based on which it concluded that plaintiff had not established a prima facie case of discrimination, without addressing the many remaining discriminatory and retaliatory actions plaintiff had alleged.

None of the evidence brought in support of the three claims reviewed by the district court was related in any way to the evidence supporting plaintiff's other claims (e.g., discrimination in compensation, failure to promote, discrimination in training, denial of merit increase in 1993, discriminatory and retaliatory performance reviews, etc.). The facts and the evidence were not interchangeable, wherefore the district court may not have extended its findings from one claim to the other.

Likewise, a finding of failure to prove a prima facie case of discrimination does not compel, as a matter of law, a finding of failure to prove a prima facie case of retaliation, because the prongs are different, the sets of proof are different, and thereby, the analysis of a discrimination claim is altogether different from the analysis of a retaliation claim. At no time did the district court address plaintiff's protected activities or the causal connection between her protected activities and the alleged adverse actions. It is based on such distinct analyses that courts have agreed that a plaintiff may fail on her discrimination claim yet be successful on her retaliation claim.

In light of the above, the lower courts' decision is erroneous as a matter of law, and wholly inconsistent with this Court's previous holdings. Such errors also reveal a tendency to ignore a *pro se* plaintiff's efforts to vindicate her rights under the American justice system, and therefore necessitate review by this Court.

IV. The lower courts misapplied the well established three-tier burden shifting analysis set forth by the Court in *McDonnell Douglas v. Green*, *Texas Dep't of Community Affairs v. Burdine*, and other cases

It is settled law that the burden of production (the 2nd tier of

the McDonnell Douglas test) shifts to the employer only after plaintiff has established a prima facie case (the 1st tier of such test). A court may not review issues pertaining to the 2nd and 3rd tier of the McDonnell Douglas burden shifting analysis, yet decide the disputed issue based on plaintiff's alleged failure to satisfy the 1st tier (make out a prima facie case), particularly when neither the court nor the defendant had challenged any fact related to the prima facie case. Thus, the fact that the lower courts have examined defendant's proffered reasons clearly indicates that plaintiff had created the presumption of discrimination through her prima facie case.

For example, the district court's ruling on plaintiff's termination claim is based strictly on the grounds for termination, which indicates the court found the burden had shifted to the defendant (the 2nd tier of the McDonnell test). (See Pet. at 25-28) Yet, inexplicably, the court concluded that plaintiff had not made out a prima facie case (which is the 1st tier of the test). Technically, this is a further error as a matter of law.

Similarly, at oral argument before the court of appeals, the dispute regarding Snell's retaliatory performance appraisal centered solely around Mr. Goldstein's proffered reason and plaintiff's rebuttal of such reason, in other words around the 2nd and 3rd tiers. App. 17a-23a. (See also Pet. at 18-19)

If the lower courts' concern was whether or not plaintiff had sustained her burden of establishing a prima facie case, it should have tried to determine the sufficiency of the evidence supporting plaintiff's prima facie case (the 1st tier) rather than debate the employer's proffered reasons (the 2nd and 3rd tier).

Therefore, the decision of the court below affirming the district court's judgment that plaintiff failed to make out a prima facie case, was inconsistent with this Court's long and well established three-tier burden shifting analysis.

C. THE DECISION OF THE LOWER COURTS CONFLICTS WITH THE SUMMARY JUDGMENT PROCEDURE ASSERTED BY THE COURT IN *ANDERSON V. LIBERTY LOBBY* AND REASSERTED IN *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*

The Court has recently reasserted some of the summary judgment precepts in *Reeves v. Sanderson Plumbing Products, Inc.*:

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. *Liberty Lobby, supra,* at 225. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. See Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses'. *Id.*, at 300."

The decision of the lower courts is a far departure from the Court's long-established model for summary judgment:

I. The lower courts considered exclusively the evidence favoring the moving party, although powerfully contradicted and impeached by plaintiff's evidence, and drew unreasonable inferences in favor of the moving party

As shown earlier, in reaching their decision, the lower courts ignored the evidence favoring the nonmovant (including the evidence which remained uncontested by defendant), in violation of the Court's established standard for summary judgment. Furthermore, the lower courts considered exclusively the evidence favoring the moving party. This is not a case where the moving party showed conclusively or through uncontradicted and unimpeached evidence that there was no discrimination. To the contrary, each piece of evidence offered by the defendant was powerfully contradicted by plaintiff's evidence proving the defendant's evidence was unreliable, vague or subjective, unworthy of credence, inconsistent with other evidence produced by defendant, or downright false.

Furthermore, defendant's evidence was based exclusively on the testimony of "interested" witnesses.[10] This Court has clearly

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[10] On appeal, plaintiff had argued that defendant's evidence was based on the testimony of interested parties, i.e., Belowich, Freeman (HR Assistant), Glazer (MBC's Vice President in charge with HR, who had been directly involved in the

instructed that in such cases, only nonmovant's evidence should be considered.

Briefly, the facts, the evidence, and the inferences based on which the district court held plaintiff had not made out a prima facie case of discrimination were:

(1) "*First is that during her first three months of employment the plaintiff was given an excellent rating by the very people whom she contends were later given over to various comments that the plaintiff alleges were discriminatory*". App. 25a.

This Court had not found the 3 (three) promotions received by Vinson in *Meritor*, or the promotion by Ellerth in *Burlington* to plead in favor of defendant. A good rating (not the highest), does not even come close to a promotion. Additionally, plaintiff had shown on appeal that based on the evidence in the record, and also on the Second Circuit's previous holdings, the district court's inference was improperly drawn in favor of the moving party, and that "the question of whether Belowich's earlier positive introductory review is an indicator of prejudice or of nondiscrimination, suggests in fact that the issue is disputed and is not susceptible to resolution by summary judgment".

(2) " *[I]t should not be expected that the very people who are accused of discrimination and creating a hostile environment would have hired the plaintiff ... or her husband ...* ". App. 25a.

At oral argument, the court of appeals rejected such inference, App. 20a, and so had Nace in her brief on appeal.[11]

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discriminatory retaliation against plaintiff), and Cummings, MBC's Vice President of Legal Affairs. Plaintiff had contested all such evidence.

[11] Plaintiff had written: "Highly qualified people of American descent would not (1) seek Administrative Assistant positions, and (2) would not accept the discriminatory salary that Plaintiff and her husband were offered. Thus, the defendant was a double winner: (a) Firstly, it won highly qualified people ... (b) Secondly, despite Plaintiff's and her husband's superior skills and educational background, defendant paid both of them at a lower rate than what it was regularly paying for such positions to younger employees who were not of Romanian origin. Accordingly, this may have been a potential defense provided defendant had paid Plaintiff and her husband the same salary it paid equally situated employees for the same positions. The proper inference to be drawn at summary judgment would have been that Plaintiff and her husband were from the very start discriminated in compensation, thus revealing the defendant's tendency to discriminate against people who are of Romanian origin and older in years. What happened afterwards, i.e., the harassment, the discrimination, and the retaliation suffered by Plaintiff and her husband actually serve to confirm that this was indeed the only reasonable inference to be drawn".

The district court considered the two reasons above as "*two very important facts that are inconsistent with the existence of a discriminatory environment*", App. 26a, and remained silent with respect to plaintiff's overwhelming evidence to the contrary.

(3) "*Third, I am persuaded that plaintiff's response when she was put on probation ... is devoid of any comment about the discrimination matters which she now contends created a hostile work environment*".

In the context of a hostile work environment claim, the reasonableness of plaintiff's complaints is a factually disputed issue which is part of the affirmative defense an employer is allowed to raise after the hostile environment claim has been found actionable. Technically, once the court reached the issue of employer liability (see *Burlington*) , the court must have actually found plaintiff's hostile work environment claim actionable. (See Pet. at) Indeed, none of the plaintiffs in *Meritor, Faragher,* or *Burlington* had complained, yet such failure did not preclude this Court from finding their claims actionable.

(4) "*It seems to me that what we have here are boorish comments and verbal indiscretions ...*". App. 26a. The court impermissibly substituted its judgment concerning the objective severity of the remarks. (See Pet. at 12) By affirming the judgment, the court below contravened not only this Court's established standard for "objective severity" of harassment, but also its own decisions and instructions from prior racial hostile environment cases.

(5) "*I further find as persuasive indication that no prima facie case has been shown that Ms. Nace did not receive any deleterious job reaction from her complaints against Dr. Lieberman and Mr. Belowich. Her position was transferred*". App. at 26.

Here, the district court referenced plaintiff's allegation that after she had complained about the age and national origin based harassment during the investigation, she was demoted, two levels down. Earlier during oral argument the district court had said: "*Sometimes a company may assign its best worker to some ministerial level because the company feels that the work has to get out at that level, especially with regard to a secretary*". Plaintiff's attempt at clarifying the court's misunderstanding of the relevant facts, "*Well, your Honor, it is obvious that the company did not regard me as one of the best secretaries, because if they had regarded me like this they would not have placed me on probation twice*", was ignored. Plaintiff had alleged on appeal that such inference was unreasonable and

evidently drawn in favor of the moving party. It was also inconsistent with this Court's decision in *Faragher* holding that undesirable reassignment may constitute tangible action.

(6) The district court ended by giving an unfounded and subjective opinion with regard to plaintiff's termination, in sharp conflict with the established summary judgment precepts.

According to the basic principles of summary judgment asserted by this Court in *Liberty Lobby*, and most recently in *Reeves*, only when the evidence of the moving party is uncontradicted and unimpeached or otherwise "conclusive" may it be relied upon to grant summary judgment. None of the district court's findings or inferences was based on such evidence. As shown earlier, the inferences themselves were clearly drawn in favor of the defendant, a further inconsistency with the Court's established summary judgment procedure.

II. The lower courts solved genuine issues of material fact which were the exclusive province of a factfinder, and thus contravened the summary judgment rules established by the Court in *Anderson v. Liberty Lobby* and other landmark cases

The Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 issued clear instructions with respect to summary judgment, holding that the court must determine whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party", and concluded: "In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law".

The district court solved the disputed issue of the hostile environment and of plaintiff's demotion in 1994 based on personal perceptions, on misunderstood facts, and on unreasonable inferences drawn against the nonmoving party. (Pet. at 23-24) If the evidence in the record had been reviewed according to the Court's well established rules, it may by no means have indicated that it was so one-sided that the moving party "must prevail as a matter of law". *Liberty Lobby*.

The only other issue reviewed by the court was plaintiff's termination, where the court solved the factually disputed issue, although it was based solely on credibility assessments, and was

therefore the province of the jury. The court's decision was wholly inconsistent with this Court's holding in *Liberty Lobby*.

Very briefly, the following facts related to Nace's termination were before the lower courts: on August 12, 1998, Nace told Freeman, the Human Resources Assistant, that she had taped a previous discussion of theirs. On tape Freeman acknowledged that Belowich used to call Nace *old and wretched "on a regular basis"*, and that employees of Hispanic origin had complained to Freeman about Belowich's "*slave*" remark. Nace told Freeman that since she had denied all this during her deposition, she saw herself obliged to produce the tape, since it was critical to her lawsuit. In an honest attempt to prevent any kind of harm that the revealing of the tape may have produced to Freeman, Nace offered her an opportunity to correct her mistake by telling the truth in an affidavit. Freeman sounded truly grateful for this kind offer, and agreed to give an affidavit, but asked to listen to the tape first. Plaintiff agreed. Right after their discussion, however, Freeman contacted the law firm representing defendant in the instant litigation, went to their offices that same day, and defendant's counsel prepared Freeman's affidavit (counsel's own words), which was falsely accusing Nace of having intimidated and threatened Freeman with suing her for perjury. Neither plaintiff's supervisor, nor Human Resources were involved in the subsequent decision. It was only MBC's Vice President of Legal Affairs, Andrew Cummings, Esq., and the law firm representing MBC in the instant lawsuit that handled the facts related to the termination. Thus, Cummings advised Nace that based on Freeman's affidavit she was going to be suspended from work without pay for one week, time in which Cummings was reportedly going to investigate Freeman's allegation. Though plaintiff firmly denied the false allegation, Cummings persisted in his decision to suspend Nace, which, plaintiff alleged, was probative of his having anticipated the result to the investigation. The suspension was extended to 2 months, and on October 13th Nace received Cummings' termination letter. The letter clearly states the reason for termination: Nace's alleged threat and intimidation of Freeman. Nothing else is implied or vaguely alluded to. App. 29a-30a.

The record adequately supported a reasonable inference drawn in favor of the nonmovant, i.e., that defendant had meticulously constructed a false accusation which would enable

it to fire plaintiff.[12] A factfinder, after reviewing all the evidence surrounding plaintiff's termination, is very unlikely to credit the defendant's false allegation. Indeed, the Department of Labor which is regularly reviewing labor disputes, investigated MBC's opposition to plaintiff's application for unemployment benefits, reviewed all the documents related to plaintiff's termination, and concluded: "*The claimant was discharged because of a conversation she had with another employee regarding her lawsuit against Merit. There is no evidence of misconduct.*" The Department of Labor acted like a finder of fact.

The evidence clearly indicated that the only disputed factual issue with respect to Nace's termination was: Freeman alleged that plaintiff had intimidated or threatened her, while plaintiff firmly denied Freeman's allegation. Since the court sitting at summary judgment may not make credibility determinations, the disputed factual issue was not susceptible to resolution by summary judgment.

The district court, however, discounted the existence of this genuine issue of material fact, and in its ruling at the close of oral argument, the court produced two new "surprise" legitimate reasons for plaintiff's termination; (a) one which was based on its misunderstanding of facts; and (b) another one, which was altogether new, new to defendant, new to plaintiff, and as such had not been briefed or argued by the parties.[13] The court then

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[12] Very briefly, the evidence before the lower courts revealed: (1) Defendant had violated all its policies and procedures in the way it handled Freeman's complaint and Nace's termination; (2) The law firm representing the defendant in this litigation was from the very first day involved in plaintiff's termination; (3) Cummings conducted the "company investigation" with respect to "workplace behavior" in the offices of the law firm representing MBC in this lawsuit; (4) Freeman's affidavit contained memory fluctuations; (5) The 2 months of suspension without pay were strategically used to force plaintiff into a settlement agreement; (6) The defendant's retaliatory intent was manifest in the opening paragraph of Cummings' termination letter, suggesting that plaintiff was accountable for Freeman's improper use of company time, App. 29; (7) Shortly after Nace rejected MBC's settlement offer, she was terminated; (8) The way the company handled Freeman's complaint was in sharp contrast with the way it had handled Nace's previous complaints or other employees' complaints about Belowich's discriminatory treatment.

[13] Even assuming that the district court did not view the issue of material fact regarding plaintiff's termination as being based on credibility determinations, and further assuming that plaintiff was terminated based on the two reasons

(continued)

concluded that plaintiff had not made out a prima facie case. As a general practice, a court may not volunteer opinions on nonissues, in "[t]he absence of briefing or meaningful argument by the parties". *Kolstad v. American Dental Ass'n* (1999). Assuming defendant itself had changed its earlier justification for plaintiff's termination, the court may not have relied upon it to grant summary judgment to defendant.

The district court's acting on behalf of the defendant is so far a departure from the model for summary judgment that this Court has not yet had an opportunity to rule on errors of this kind. The court below had adjacently expressed its view on the role of courts in a related context: "But in moving for summary judgment [defendant] chose not to proffer a single non-retaliatory reason for the transfer, and it is not our role to do so now on [its] behalf". *Richardson v. N.Y.S. Dept.* 1997 WL 797527 (1999)

Furthermore, the Court had emphatically held that a judge may consider evidence supporting the moving party "that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses". *Reeves*, supra. Freeman, HR Assistant, had a history of covering up for MBC's unlawfulness, and was as such not a disinterested party.

Thus, the lower courts' holding with respect to plaintiff's termination is glaringly inconsistent with this Court's long-established model for summary judgment, and should not be permitted without review by this Court.

(continued)

produced by the court, the court's ruling is still inconsistent with established summary judgment procedure, because: the first ground articulated by the court was in itself a factually disputed issue, and plaintiff had submitted irrefutable evidence showing the defendant had concocted such reason in order to justify the written warning given to plaintiff in retaliation for her deposition testimony of 3 days before. According to this Court's instructions, contradictions between plaintiff's evidence and defendant's evidence on material points create issues of material fact, wherefore summary judgment is precluded. *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Liberty Lobby*, supra; *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986). The second ground for termination produced by the court regarding a presumed relationship of "candor" assumed to exist between the accused (defendant) and the accuser (plaintiff) was improper as a matter of law, because a court at summary judgment may not act on behalf of the moving party and come up with a new justification for defendant's business decision, an issue which had never been argued or briefed by the parties.

D. *PRO SE* PLAINTIFF WAS NOT AFFORDED A FULL AND FAIR OPPORTUNITY TO PROVE HER CASE

Petitioner respectfully submits that due to her *pro se* status, she was not afforded a full and fair opportunity to prove her case.

At summary judgement, Nace had been afforded 20 days to submit her opposition papers. She requested an extension of 28 days, yet was granted only 5 days.

At oral argument before the district court, Nace could not raise any of the issues she had intended to (although she had specifically mentioned in her opposition papers that she planned to discuss a number of issues at oral argument) because her time had expired (she was initially afforded 15 minutes, yet was obliged to respond to Judge Hellerstein's questions, and did not have any second left for her argument).

At oral argument before the court of appeals, plaintiff was given 5 minutes to split between her argument and her rebuttal.

Local Rule 34 of the Federal Rules of Appellate Procedure for the Second Circuit states in part: "*Normally, ten or fifteen minutes will be allotted to each side ... Arguments in pro se appeals are normally 5 minutes per side*".

In the context of an employment discrimination lawsuit, the stipulation of Local Rule 34 allotting 5 minutes for argument in *pro se* appeals places only plaintiffs at a disadvantage, because the defendants may not represent themselves.

The limitation on *pro se*'s time for argument (Local Rule 34) is inconsistent with the asserted principle that *pro se* civil rights litigants should be afforded every reasonable opportunity to demonstrate they have a valid claim. In addition, it shows there is a tendency in the Second Circuit to discount a *pro se's* argument. Such tendency may account for the way both lower courts approached the case, which was a far departure from this Court's established rules and decisions.

Based on (a) the denial of a fair or reasonable opportunity to argue before the district court, on (b) the Second Circuit's Local Rule 34, which reveals a tendency to differentiate between represented and unrepresented parties by placing *pro se*'s at a disadvantage, on (c) the manifest inconsistency between the decision of the court below in this case and its prior decisions in comparable cases, on (d) the absence of any explanation in the Second Circuit's summary order, on (e) the fact that the evidence

plaintiff had submitted was ignored, and on (f) the great number of violations of basic rules governing summary judgment, petitioner is entitled to allege that her case did not receive full and fair consideration by the lower courts.

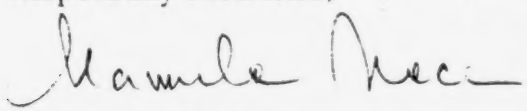
For the foregoing reasons, it is critical that this Court review the decision of the court below denying *pro se* plaintiff's "day in court" historically promised by the American Model of Litigation, and thus reaffirm a *pro se*'s equal rights, not only theoretically, but also practically.

The issues presented in this petition are of broad and vital importance to all subsequent employment discrimination claims. Issues similar to those presented by this case of hostile work environment, for example, are going to be litigated in numerous similar cases arising under Title VII or the ADEA, and the Court should provide a more specific framework for the analysis of such claims. Also, the issues presented in this petition are critical to the American system of justice, and the Court should not let glaringly erroneous determinations in a case of public importance, an employment discrimination action, without review. The special combination of features and reasons set forth in this petition strongly warrants review by the Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



MANUELA NACE
Pro Se Petitioner
3989 Grand Haven Road, Apt. 201A
Muskegon, MI 49441
(231) 799-9997

Date: November 6, 2000

No.

IN THE

Supreme Court of the United States

MANUELA NACE,
Petitioner,

-vs-

ACHIEVEMENT & GUIDANCE CTRS. OF AMERICA/ MEDCO BEHAVIORAL CARE SYSTEMS,
Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Second Circuit

APPENDIX TO PETITION

Manuela Nace
Petitioner
3989 Grand Haven Road
Apt. 201A
Muskegon, MI 49441
(213) 799-9997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16th day of May, two thousand.

PRESENT:

HON. GUIDO CALABRESI,
HON. FRED I. PARKER,
HON. CHESTER J. STRAUB,
Circuit Judges.

MANUELA NACE,
Plaintiff-Appellant-Cross-Appellee,

v.

SUMMARY ORDER
99-7940 (L)
99-9031 (XAP)

ACHIEVEMENT & GUIDANCE CENTERS OF AMERICA, INC./MEDCO BEHAVIORAL CARE SYSTEMS,
Defendant-Appellee-Cross-Appellant.

Appearing for Appellant-Cross-Appellee: MANUELA NACE, *pro se* Forest Hills, NY.

Appearing for Appellee-Cross-Appellant: MARVIN M. GOLDSTEIN Proskauer Rose LLP, New York, NY (Devora L. Lindeman, Elana Gilaad, Michael Macmanus, Proskauer Rose LLP, New York, NY, *on the brief*).

Appeal from the United States District Court for the Southern District of New York (Alvin K. Hellerstein, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be and hereby is AFFIRMED in part and VACATED and REMANDED in part.

Manuela Nace brought suit against Achievement & Guidance Centers of America/Medco Behavioral System ("Achievement"), her former employer, claiming (1) that she was subjected to a hostile work environment and discriminated against because of her age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, (2) that Achievement retaliated against her in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, (3) that Achievement engaged in intentional discrimination against her and subjected her to a hostile environment based on her national origin in violation of Title VII, (4) that Achievement subjected her to a hostile work environment

based on her age and national origin in violation of the New York State Human Rights Law, N.Y. Exec. Law § 296(3-a)(a), and the Municipal Code of the City of New York, § 8-107(1)(a), (5) that Achievement failed to post notices as required by Title VII and the ADEA,[1] and (6) that Achievement failed to pay her overtime pay in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* The district court granted summary judgment on all of Nace's discrimination claims and dismissed without prejudice her state law claims. We now affirm that judgment for substantially the reasons that court gave. That is, we agree with the district court that Nace has failed to make out a claim of discrimination or retaliation. We also agree that, even if we assume *arguendo* that Nace's allegations regarding the comments and actions of those at Achievement are true, they do not amount to the creation of a hostile work environment. *See Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 765 (2d Cir. 1998). Moreover, once having granted judgment in favor of Achievement on the federal claims, the district court acted well within its discretion in dismissing Nace's state law claims without prejudice. *See* 28 U.S.C. § 1367(c)(3) (a district court may decline to exercise supplemental jurisdiction over state law claims where the related federal claims are dismissed).

With respect to Nace's FLSA claim, the district court granted judgment in favor of Nace and awarded her $ 4290.00. Achievement, in its cross-appeal, concedes that Nace is entitled to wages under FLSA but argues that she should have been awarded only $ 544.86 because (1) the district court used the wrong hourly wage figure to calculate Nace's overtime wages, (2) the district court improperly included in Nace's FLSA award Nace's regular wages (for the hours she worked overtime) despite the fact that she had already been paid her ordinary hourly wages for those hours, and (3) the district court awarded Nace wages for more overtime hours than she actually worked.

---

[1] On appeal, Nace does not challenge the district court's ruling that she failed to show that Achievement did not post the notices required by Title VII and the ADEA.

Achievement's concerns with the amount awarded to Nace may well have merit. But we are unable, on the record before us, to determine the proper amount that should be awarded to Nace. We therefore vacate this portion of the judgment and remand the case to the district court for reconsideration and a fuller explanation of its FLSA award calculation.

Affirmed in part, vacated and remanded in part.

For the Court:

ROSEANN B. MACKECHNIE, Clerk

by s/Lucille Carr

UNITED STATES COURT OF APPEALS
FILED MAY 16, 2000
Roseann B. MacKechnie, CLERK
SECOND CIRCUIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MANUELA NACE, Plaintiff, -against- ACHIEVEMENT & GUIDANCE CENTERS OF AMERICA, INC./ MEDCO BEHAVIORAL CARE SYSTEMS, INC. Defendant.	ORDER 94 Civ. 8986 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

By notice of motion dated, May 20, 1999, defendant Achievement & Guidance Centers of America, Inc./Medco Behavioral Care Systems ("Medco") moves this court for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure dismissing plaintiff Manuela Nace's complaint alleging national origin and age discrimination in violation of Title VII, New York State and New York City law, and alleging violation of the Fair Labor Standards Act. Oral argument was held before me on Friday, June 25, 1999, in Courtroom 14D, 500 Pearl Street, New York, New York, 10007. For the reasons stated on the record during oral argument:

a) plaintiff is granted judgment on her Second Claim for Relief seeking overtime payments in the amount of $4,290.00; and

b) summary judgment in favor of defendant is granted with respect to plaintiff's First Claim for Relief alleging

that defendant's conduct constitutes intentional discrimination in violation of the ADEA § 4, 29 U.S.C. § 623 (1999); Third Claim for Relief alleging retaliation in violation of Section 704(a) of Title VII, 42 U.S.C. § 2000e-3 (1999); Fourth Claim for Relief alleging discrimination on the basis of her national origin, in violation of Section 703 of Title VII, 42 U.S.C. 2000e-2 (1999); Fifth Claim for Relief alleging that the discriminatory practices were intentional in violation of Section 706 of Title VII, 42 U.S.C. § 2000e-5 (1999); Sixth Claim for Relief alleging discrimination on the basis of her age, in violation of the ADEA § 4, 29 U.S.C. § 623 (1999); Eighth Claim for Relief alleging that defendant's conduct constitutes willful and intentional discrimination against plaintiff, in violation of 703 of Title VII, 42 U.S.C. 2000e-2 (1999); Ninth Claim for Relief alleging that defendant failed to post and keep posted a summary of the pertinent provisions of Title VII, in violation of Section 711 of Title VII; and Tenth Claim for Relief alleging that defendant failed to post and keep posted a notice prepared and approved by the EEOC which summarized the pertinent provisions of the ADEA.

c) Because I have dismissed all of plaintiff's remaining federal claims for relief, I decline to exercise supplemental jurisdiction over plaintiff's Seventh, Eleventh and Twelfth Claims for Relief based on New York State and New York City law.

Plaintiff's complaint is dismissed with prejudice with respect to her First, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Claims for Relief; and dismissed without prejudice with respect to her Seventh, Eleventh and Twelfth Claims for Relief. The Clerk of the Court is directed to enter judgment in favor of plaintiff on her Second Claim for Relief in the amount of $4,290.00, and to enter judgment in favor of defendant with respect to the balance of the complaint. The Clerk of the Court is directed to close this matter.

SO ORDERED.

Dated: New York, New York
June 29, 1999

s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

It is ORDERED that counsel to whom this Order is sent is responsible for faxing a copy to all counsel and retaining verification of such in the case file. Do not fax such verification to Chambers.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MANUELA NACE, Plaintiff.	94 **CIVIL** 8986 (AKH)
-against-	**JUDGMENT**
ACHIEVEMENT & GUIDANCE CENTERS OF AMERICA, INC./ MEDCO BEHAVIORAL CARE SYSTEMS, INC. Defendant.	#99/1525

Defendant having moved for summary judgment and the matter having come before the Honorable Alvin Hellerstein, United States District Judge, and the Court on June 29, 1999 having rendered its Order directing the Clerk to enter judgment dismissing plaintiff's first, third, fourth, fifth, sixth, eighth, ninth and tenth claims for relief and in favor of plaintiff on her second claim for relief in the amount of $4,290.00 and to enter judgment in favor of defendant with respect to the balance of the complaint and closing the matter, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order, dated June 29, 1999, plaintiff's complaint is dismissed with prejudice with respect to her first, third, fourth, fifth, sixth, ninth, and tenth claim for relief and dismissed without prejudice with respect to her seventh, eleventh and twelfth claims for relief; furthermore, judgment is hereby entered in favor of plaintiff on her second claim in the amount of $4,290.00, and in favor of defendant with respect to the balance of the complaint; accordingly, this matter is closed.

Dated: New York, New York
July 6, 1999

JAMES M. PARKISON

Clerk of Court

BY:

s/indiscernible
Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 7/7/99

U.S. DISTRICT COURT
FILED JULY 6, 1999
S.D. OF N.Y.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the eighth day of August, two thousand.

MANUELA NACE,
Appellant,

Dkt No: 99-7940

v.

ACHIEVEMENT & GUIDANCE CENTERS OF AMERICA, INC./MEDCO BEHAVIORAL CARE SYSTEMS,
Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant MANUELA NACE.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

BY: s/Arthur M. Heller
Arthur M. Heller
Administrative Attorney

UNITED STATES COURT OF APPEALS
FILED AUGUST 8, 2000
Roseann B. MacKechnie, CLERK
SECOND CIRCUIT

Age Discrimination in Employment Act (ADEA)
29 U.S.C. §§ 621-633a

§623 (§4) Prohibition of Age Discrimination

(a) It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;

...

(d) It shall be unlawful for any employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership, has opposed any practice made unlawful by this section, or because such individual, member, or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

Title VII of the Civil Rights Act of 1964
42 U.S.C. §§2000e – 2000e-15

§703. Discrimination Because of Race, Color, Religion, Sex, or National Origin

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or,

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

...

(d) It shall be an unlawful practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

...

§704. Other Unlawful Employment Practices

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency or joint labor-management committee controlling apprenticeship or other

training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

MANUELA NACE,
Appellant,

- vs -

Docket No: 99-7940
May 5, 2000

ACHIEVEMENT and GUIDANCE CENTERS,
Appellee.

TRANSCRIPT OF CIVIL CAUSE FOR MOTION

BEFORE: GUIDO CALABRESI, Circuit Judge
FRED I. PARKER, Circuit Judge
CHESTER J. STRAUB, Circuit Judge

APPEARANCES:

For the Appellant: MANUELA NACE, pro se

For the Appellee: MARVIN GOLDSTEIN, ESQ.

Proceedings Recorded by Electronic Sound Recording Transcript
Produced by Transcription Service

PARSLEY ASSOCIATES, INC.
328 Flatbush Avenue, Suite 251
Brooklyn, NY 11238
(718) 789-0620

JUDGE CALABRESI: We will hear Manuela Nace versus Achievement and Guidance Centers. You may proceed.

MS. NACE: Good morning, Your Honor. My name is Manuela Nace.

JUDGE CALABRESI: Speak into the microphone, and nice and loud. Thank you.

MS. NACE: My name is Manuela Nace and I am a pro se plaintiff-appellant-cross-appellee.

My discrimination and retaliation claims were dismissed by the court below because I had allegedly not made out a prima facie case. I have shown in my brief on appeal that I had made out a strong prima facie case, regardless of what test is being applied. And thus I have fully met my first burden.

When defendant has articulated legitimate nondiscriminatory reasons for the adverse actions that I had alleged, it has, for some of its explanations, met the burden, it has not for other such adverse actions, because defendant has not produced any explanation for actions like discriminatory and retaliatory performance reviews, discrimination in provision of overtime, or discrimination in my rights to equal training opportunities, and others that were presented in my brief.

As for the adverse actions that defendant has tried to rebut and articulated subjective explanations – a subjective explanation based on the main offender's –

JUDGE CALABRESI: Let me tell you what my problem is. You allege a variety of statements based on age and based on ethnic background in your pleadings. But by the time you were fired, the supervisors who were in charge were no longer the ones who had made these remarks.

MS. NACE: Yes.

JUDGE CALABRESI: How do you fill that gap?

MS. NACE: I filed my complaint in court in December of '94. The complaint was filed for the first part of my employment. After I filed the complaint, the company has continued to engage in discrimination and has retaliated against me. So, actually we're speaking about two parts: the first part of my employment and the second part of my employment. And the people who have discriminated against me or retaliated against me were not the same. So, for the first part of my employment we have Belowich who is the main offender, --

JUDGE CALABRESI: So you're saying that you've had people discriminating against you before, --

MS. NACE: Right.

JUDGE CALABRESI: -- and then you say that they retaliated against you, other people retaliated against you, in fact. And what evidence of the retaliation is there?

MS. NACE: There are several allegations of retaliation. For example, my performance evaluation for the annual review period 1996, where I had received "needs improvement", and therefore I had not received any merit increase. And there is some direct evidence in the record of retaliatory motive, when my direct supervisor, Ms. Carol Snell, during her deposition had stated that the performance evaluation - she didn't say it word for word like this, but she said that certain paragraphs from my performance evaluation had to be written as they were because I was in a litigation against the company, because I had complained about discrimination several times, and she didn't want to get in the middle of it because she liked me, she liked the company she was working for. She was ---

JUDGE CALABRESI: That is in the record?

MS. NACE: Oh, yes. Absolutely. It's in the record. And it's a few pages of deposition testimony where I wanted to make sure that I didn't misunderstand her deposition, and I insisted on her to say why she had written what she had written in her - in my performance evaluation. So this is one, one retaliatory action that defendant has not produced any kind of explanation for. It was also an adverse action because I was -

THE COURT: I understood that, but are you saying that she indicated that she did not put some things in about the complaints that you had made?

MS. NACE: I didn't understand the question. I did not put something in?

THE COURT: When you were just answering Judge Calabresi's question --

MS. NACE: Yes.

THE COURT: --- you mentioned this deposition, ---

MS. NACE: Right.

THE COURT: --- and the fact that she liked you and she liked your work. But then are you saying that she didn't put things in because of the prior complaints?

MS. NACE: No. I don't know exactly how I worded that. I said that she wrote what she wrote in the performance evaluation, and, if I remember well, it's the sentence that prompted my discussion with her, "you need to make more of an effort to perceive the company in a more global positive light". I may not have quoted word for word. But because of this sentence, which had been written under "Interpersonal skills", and my interpersonal skills had been rated with "needs improvement", I asked her at the deposition what she meant by this, that I "needed to have a more global positive attitude towards the company". And then she gave the response that is in the record, and her deposition testimony, yes, it's in the record. If the Court wants I can indicate what ---

JUDGE CALABRESI: Well, your red light is on. You've retained a minute for rebuttal, you can use it now or you can use it later. Which would you prefer?

MS. NACE: I'll use it later. Thank you so much.

MR. GOLDSTEIN: Good morning. Initially we had not requested oral argument.

JUDGE CALABRESI: Yes, I granted the motion this morning.

MR. GOLDSTEIN: And we requested the oral argument in the event that we felt that there were issues raised by Mrs. Nace ---

JUDGE CALABRESI: Speak right into the microphone.

MR. GOLDSTEIN: We had requested oral argument in the event that there were issues raised by Mrs. Nace that we felt that we needed to address that were not in our brief. We would waive our argument at this time, subject to hearing Mrs. Nace's rebuttal, unless the Court has any questions.

THE COURT: Well, while you're there, why don't you address this point she made about retaliation by virtue of the new superior's comments or lack thereof.

MR. GOLDSTEIN: Yes, sir. Yes, Your Honor. The comment was in the evaluation, that Mrs. - Miss Snell felt that Mrs. Nace's attitude towards the executives of the company were negatively impacted by the fact that she had ongoing litigation and suggested to her that she attempt to improve her attitude. That was the sum and substance of it. There was no retaliation. It was an observation by a supervisor, and there was no negative impact on Mrs. Nace's --

JUDGE CALABRESI: But if that statement was put in because she had brought the prior suit, then that would be improper, wouldn't it?

MR. GOLDSTEIN: Yes, Your Honor. But it was not because she had brought a prior suit, it was because of the attitude that Miss Snell perceived of her subordinate.

JUDGE CALABRESI: But is there any evidence in the record that - of a statement by her that she did it because of the prior suit?

MR. GOLDSTEIN: No, Your Honor.

JUDGE CALABRESI: There seems to be a contradiction in that , we'll have to look at the record.

MR. GOLDSTEIN: Yes, Your Honor.

JUDGE CALABRESI: On the matter of the Fair Labor Standard Act ---

MR. GOLDSTEIN: Yes, Your Honor.

JUDGE CALABRESI: --- you claimed that the figure that the District Court awarded was not supported. But do you say what the correct figure was?

MR. GOLDSTEIN: Yes, we do. In our brief, Your Honor. It's ---

JUDGE CALABRESI: But there's no finding by the District Court with respect to the number of extra hours that she worked?

MR. GOLDSTEIN: That is correct, Your Honor.

JUDGE CALABRESI: So even if we agreed with you, we would not be in a position to say that is the figure. We would have to send it back to the District Court for further findings.

MR. GOLDSTEIN: We do understand that, Your Honor. The concern was that the District Court did make a finding that there were hours that Mrs. Nace worked for which she received no pay, and we felt we needed to address that. Thank you.

THE COURT: Mr. Goldstein, ---

MR. GOLDSTEIN: Oh, I'm sorry.

THE COURT: --- Ms. Nace alleges that in the earlier part of the time that she was in the employment of the company there were a series of events: the remarks by Mr. Belowich about two to four times a week that she was old and wretched, I believe it was; and then, if you don't like our overtime policy, go back to your country; and the FBI is watching you Romanians, you've got this bad European attitude, and so on. And that ceased. But she does

have a hostile work environment claim. And it was shortly after this kind of remarks that she got on probation. And I'm trying to figure out how the Court could decide that there was no fact issue involved with this hostile work environment [indiscernible] ---

MR. GOLDSTEIN: Your Honor, the ---

THE COURT: --- by virtue of the fact that when she did her report she didn't mention these things. Is there some explanation for that?

MR. GOLDSTEIN: Indeed, there were two memos from Mrs. Nace, in neither of those memos did she raise the issue of either age discrimination or hostile environment. In her deposition ---

THE COURT: Well, I asked the question, why isn't it then for a jury to figure out, were the remarks made, were they sufficiently severe, and how come you didn't mention it?

MR. GOLDSTEIN: Your Honor, I think that Judge Hellerstein properly came to the conclusion that there was no significant question of fact, given that Mrs. Nace was hired by the same people who she alleges discriminated against her. They knew she was Romanian. They knew her age. They subsequently hired her husband, who they knew --- who they also knew ---

JUDGE CALABRESI: Well, you can hire somebody and not mean to fire them because of age or because of ethnic discrimination, and yet make a working condition be sufficiently awful so that somebody wouldn't stay there. A person can hire somebody from an ethnic group because they want to hire that person, if the person can do the job and comes relatively cheap, or something of that sort, and then say the kind of things that would not make a reasonable person want to stay there. Can't they?

MR. GOLDSTEIN: That could conceivably be, Your Honor. But the fact that this was a company with twenty-two employees, three of whom were Romanian of in excess of age forty, and that when you review -- if one were to review the deposition testimony of Miss Nace, what is revealed is at that time is that the number of --- the allegations of the number of these comments were considerably less than those that she now alleges occurred. They were much more spaced apart. And when put together with the fact that they were denied in large

measure by Mr. Belowich, and that in all her writings she failed to raise any of them, I believe that Judge Hellerstein properly concluded that either they did not occur or that if they did occur they were not so severe and pervasive as to create a hostile environment. And indeed, that is what we believe.

JUDGE CALABRESI: It's the severity --- the lack of occurrence sounds very much like a factual determination. The question of whether the severity is sufficient to reach that level which as a matter of law can be a hostile work environment is a different issue.

MR. GOLDSTEIN: And indeed, Your Honor, during this same period of time she is claiming that all this is occurring, she's inviting her superiors to dinner at her home. So, if there is a question of severity, surely it was not perceived by Mrs. Nace as severe.

JUDGE CALABRESI: Well, again, that may be --- that just doesn't convince me. Because somebody may be in an environment which is dreadful, and they may try to make it better by inviting the people who are doing that to their home. So, that's a kind of thing that a jury can determine, I should say. But, anyway, I think we have your argument. Thank you.

MR. GOLDSTEIN: Thank you.

JUDGE CALABRESI: You have one minute in rebuttal.

MS. NACE: I have found the portion of Mrs. Snell's deposition that I was speaking just a few minutes ago about, her answer ---

THE COURT: Is that in an appendix?

MS. NACE: Yes, it is. Eleven twenty-four, and it goes through eleven twenty-eight --- twenty-seven, actually.

JUDGE CALABRESI: Eleven twenty-four to eleven twenty-seven.

MS. NACE: Yes.

JUDGE CALABRESI: Thank you.

MS. NACE: And if I can quote just a few portions? When I'm asking her about her comment under "interpersonal relationships", Snell said, "I think --- I'm just quoting a few portions --- I think we had conversations a couple of times about the company; you felt you were really discriminated by them. I know you had come to me on a couple of occasions, and I had said to you I can't get in the middle of it. I didn't want to because I liked you, Manuela, and I liked the people I worked with then,

so I didn't want to get in the middle of it. But I know that did occur and I know the lawsuit was something that was present". And she goes on to explain about my not having a "warm and fuzzy" feeling, these are her own words, for ---

JUDGE CALABRESI: Did she refer --- I may not have caught what you said. Did she refer to the fact that you had brought suit, that you were objecting to these things?

MS. NACE: If I was ---

JUDGE CALABRESI: Is that what she was referring to, or was she referring to allegedly crude --- allegedly rude conduct on your part? Because, you see, if she ---

MS. NACE: She never --- I'm sorry.

JUDGE CALABRESI: If she was putting something down in response to claims that you had behaved rudely, that isn't retaliation. because you don't have a right to act rudely.

MS. NACE: I understand ---

JUDGE CALABRESI: If she was responding in response to your claiming a right not to be discriminated against, then that's a different thing.

MS. NACE: This is absolutely true, Your Honor. But unfortunately Mr. Goldstein has not been very accurate when he said that Miss Snell had perceived me as a rude person. The record shows that Miss Snell always said that she liked working with me, that I did a great job. And this is during her deposition. She never said I was rude.

JUDGE CALABRESI: No, no. I think you're misunderstanding my point, and then will let you go. My point isn't whether Miss Snell viewed you as being rude, but if she didn't want to get in the middle of an argument between some people who thought that you were rude, that wouldn't be retaliation. If she didn't want to get into an argument with people who discriminated against you, and you were objecting to it, that would be. So that the two things are ---

MS. NACE: Yes. And Miss Snell --- for the first part of my employment, it was only Belowich, and according to Belowich only, that complained about my being insubordinate and my behavior inappropriate. After I submitted my complaint in court, no other supervisor ever said anything about my behavior. So, when Carol Snell said that she didn't want to get in the middle, she didn't want to get in the middle because of my litigation, not because of any other executive who may have had

the feeling that my behavior was rude. Because none of those executives of 1996 believed that my behavior was rude.

JUDGE CALABRESI: Thank you.

MS. NACE: I have a few --- thank you. I also brought the checks that I received --- this is regarding the defendant's cross appeal -- because I had not attached them in the joint appendix. I brought all the checks that I received from 1993, showing the exact amount of hourly overtime, which was, as I said, ---

JUDGE CALABRESI: We can only look at what's in the record.

MS. NACE: At that time I didn't know that the defendant would claim that.

JUDGE CALABRESI: Thank you.

MS. NACE: Thank you so much.

JUDGE CALABRESI: We'll reserve decision and we will hear the next case. Thank you both very much.

MS. NACE: Thank you very much.

* * * * *

I, Stanley Gerin, certify that the above is a true and accurate transcript of the May 5, 2000 proceeding in the matter of Nace v. Achievement and Guidance Centers held before the Second Circuit Court of Appeals.

s/Stanley Gerin
Stanley Gerin

6-3-00

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MANUELA NACE,	)	
Plaintiff,	)	
-against-	)	94 CIVIL 8986 (AKH)
ACHIEVEMENT & GUIDANCE CENTERS OF AMERICA, INC./ et. al.,	)	
Defendant.	)	

June 25, 1999
10:45 a. m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

MANUELA NACE
Pro se

PROSKAUER ROSE LLP
Attorneys for Defendants
MARVIN M. GOLDSTEIN
DEVORA L. LINDEMAN
Of Counsel

THE COURT: Under Anderson v. Liberty Lobby, 477 U.S. 242, decided in 1986, it is the burden on the part of the moving party, here the defendant, to set out the grounds why there are no genuine issues of material fact. If they succeed, the burden passes to the other side, here the plaintiff, to present competent evidence to show that there are triable issues of fact.

In the context of an employee discrimination action, we obtain our learning from the decision of McDonnell Douglas Corporation v. Green, 411 U.S. 792 decided in 1973, and St. Mary's v. Hicks, 509 U.S. 502, 1993.

The plaintiff in an employment discrimination claim, which this is, must present proof of a prima facie case discrimination, and the rebuttal of any legitimate nondiscriminatory reason the employer proffers as justification for the challenged employment decision.

The Supreme Court in Oncale v. Sundowner Off Shore Services, Incorporated, which is the last word of the Supreme Court on such lawsuits, sets out the following standard: Title VII does not prohibit all verbal or physical harassment in the workplace. It is directed only at discrimination because of the grounds set out in the statute, here national origin and age, which are the points alleged.

The Supreme Court said further that conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment, an environment that a reasonable person would find hostile or abusive, is beyond Title VII's purview.

This brings us to evaluate the facts here, and I find from those facts that have been set out and the inferences that may be drawn from those facts that no prima facie case has been shown.

I am persuaded in particular by the following points: First is that during her first three months of employment the plaintiff was given an excellent rating by the very people whom she contends were later given over to various comments that the plaintiff alleges were discriminatory.

If there was a truly hostile and discriminatory environment in the workplace, it should not be expected that the very people who are accused of discrimination and creating a hostile environment would have hired the plaintiff or would have given her excellent ratings or would have hired her

husband who was similarly situated to the plaintiff in that he was also of Romanian origin and over the age of 40.

So we now have two very important facts that are inconsistent with the existence of a discriminatory environment.

Third, I am persuaded that plaintiff's response when she was put on probation, an extensive response that is in the record, I think it was Exhibit 21 -

Ms. NACE: 21

THE COURT: -- well written, very pointed, presenting very ably the case of Ms. Nace, is devoid of any comment about the discrimination matters which she now contends created a hostile work environment.

Although Ms. Nace contends that was not the place for such remarks in that the remarks were elsewhere in the record I believe it is highly persuasive that these remarks are absent from her very able presentation of the case.

One can think of other more arbitrary and nothing more abusive than hostile remarks that amount to a case of discrimination. It seems to me that what we have here are boorish comments, verbal indiscretions, but not rising to harassment in the workplace, not to the level of what the Supreme Court requires where a reasonable person would find such hostility or abusive content as to create a workplace environment of hostility based on discrimination because of national origin or age.

I further find as persuasive indication that no prima facie case has been shown that Ms. Nace did not receive any deleterious job reaction from her complaints against Dr. Lieberman and Mr. Belowich. Her position was transferred. She worked for Ms. Jaggi, the head of the office and for a succession of other executives. And, although she did complain that Ms. Jaggi's warning reflected in Exhibit 141 was based on what Mr. Belowich told her, it was not a truthful report by Mr. Belowich, the absence of any complaint, of any kind of remark the equivalent or even approaching the equivalent of what the plaintiff alleges was a verbal harassment by Belowich and Lieberman, indicates to me that the workplace was not an offensive workplace such as that prescribed by the law.

Whatever problem with Belowich and Lieberman was a problem involving Belowich and Lieberman -- already found that they did not rise to a situation that is contemplated by the

discrimination in employment Title VII. And certainly the conduct after that --- there are no other allegations about any other employees suggest very strongly that a prima facie case has not been proved.

The next point I want to deal with is the claim of termination. It seems to me, and I so find, that from the reasonable perspective of the employer, there are two sufficient grounds to warn and then to terminate the employment of Ms. Nace, the first being the issue of personnel records that were found in the files which she had not turned over and which led to her warning, and that warning adverted to the previous occasions; and, second, the secret taping of confrontation of Ms. Freeman.

These are issues of integrity in the workplace that an employer can require, reasonably require, and morale of employees need to have a relationship of candor and openness that is inconsistent with secret taping of information.

Ms. Nace may or may not be correct in her allegation that she had to collect the documents for her employer and that she had cause to do the taping to protect her own interest. But the perspective that has to be thought about here is what is reasonable from the perspective of the employer.

A court under Title VII is not a super employer. The court does not sit in judgment of the employer's activities. The court does not second guess an employer's rational business decisions. The court only has to look to see if there has been proof of discrimination, and if the court finds that there has not been sufficient proof of discrimination, the court is required to dismiss the complaint.

There are many, many cases in the court. The court should not allow cases to proceed where there have not been triable issues shown in response to a motion for summary judgment.

I have read the papers. They are very thorough and literate papers presented by the plaintiff, three volumes of exhibits, very extensive memorandum, set of arguments, affirmations. I have read the defendant's papers. The motion for summary judgment is well made. It has not been to the satisfaction of plaintiff's burden to show that she has a prima facie case.

Accordingly, I dismiss the counts based on the federal claims for relief and, not finding a sufficient claim under federal law, I dismiss as well the state claims for relief.

I grant, as I said before, judgment for the plaintiff on the second count on the amount of $4,290 with interest and without costs. These will be the findings of the court and a summary order will issue today or Monday, and I thank you both.

I will take a recess while the next case is at the table.

MR. GOLDSTEIN: Excuse me, your Honor, just one point if I could. There are allegations also of violation of the law of the City of New York.

THE COURT: I said those state claims, I meant to include the city claims as well. I dismiss those since I dismissed the federal claims of relief. In the exercise of my discretion I do not retain jurisdiction over those.

MR. GOLDSTEIN: Thank you.

(Proceedings adjourned)

MBC

October 13, 1998

VIA OVERNIGHT DELIVERY
Ms. Manuela Nace
105-29 63rd Road
Forest Hills, New York 11375

Dear Ms. Nace:

During working hours on Wednesday, August 12, 1998, while on Merit property, you requested that Ms. Geneva Freeman, a fellow Merit employee, speak with you regarding your lawsuit against Merit. This conversation was a personal one. Although you claim to have been on your lunch break at that time, Ms. Freeman was not. Your conversation with Ms. Freeman on that date concerned previous surreptitious tape recordings the existence of which you then revealed to Ms. Freeman. You stated that the recordings were of a prior conversation or conversations between yourself and Ms. Freeman.

During this August 12th conversation, you told Ms. Freeman that the tapes proved that she had lied at a deposition she had given in your case against Merit. You also told her that unless she provided you with an affidavit changing her testimony, you would sue her for perjury. * To emphasize the seriousness of the situation, you told her that you would be suing Alan Belowich for the same reason.

Following the conversation, Ms. Freeman complained to the company that you had threatened and intimidated her. As a result of this complaint, we placed you on an unpaid disciplinary suspension beginning August 18, 1998, while we investigated her complaint.

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* *As a note, the tapes have been reviewed along with Ms. Freeman's deposition transcript. In our opinion, there was no perjury.*

We have now completed our investigation of Ms. Freeman's complaint. We rejected your assertion that this was merely a friendly conversation. Indeed, were that so, there would have been no reason for Ms. Freeman to have complained. Rather, it is our conclusion that your behavior towards Ms. Freeman on August 12th was inappropriate and improper workplace conduct.

Based upon the foregoing, this is to advise you that your employment with Merit is terminated effective immediately. A letter will be sent to you regarding your benefit coverage and other related matters.

Very truly yours,

s/ Andrew M. Cummings, Esq.

ANDREW M. CUMMINGS
Senior Vice President
Legal Affairs

Merit Behavioral Care Corporation
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New York, NY 10017

AC/fs Naceterm.ltr